JD(ATL)–02–15
Astoria, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SOUTH LEXINGTON MANAGEMENT CORP.

and **CASES 02–CA–126454**
02–CA–133274

LOCAL 32BJ SERVICE EMPLOYEES INTERNATIONAL UNION

Darma A. Wilson, Esq., for the General Counsel.[1]
Alexander Leong, Esq., and Carmelo Grimaldi, Esq.,
for the Respondent.[2]
Eyad Asad, Esq. for the Charging Party.[3]

DECISION
STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried before me in Manhattan, New York, on November 18, 2014.[4] The charge initiating case 02–CA–126454 was filed by the Union on April 11, and, after its investigation, the Government, on May 30, issued a complaint related to the allegations in that charge. The Union filed the charge initiating case 02–CA–133274 on July 22, and, after its investigation, the Government, on September 30, issued a complaint related to the allegations in that charge. On October 8, the Government ordered the two cases consolidated for litigation and all other purposes.[5] The complaint alleges the Company since April 8, has failed to recognize and bargain with the Union as the exclusive collective-bargaining representative of an appropriate unit of employees. Additionally, it is alleged: the Company discharged two unit employees on June 3; that the discharges were within the Company's discretion; at a time when the parties had not arrived at a first contract or an interim

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1 I shall refer to counsel for the General Counsel as counsel for the Government and to the General Counsel as the Government.

2 I shall refer to counsel for the Respondent as counsel for the Company and to the Respondent as the Company.

3 I shall refer to counsel for the Charging Party as counsel for the Union and to the Charging Party as the Union.

4 All dates are 2014 unless indicated otherwise.

5 I shall continue to refer to the consolidated complaints simply as the complaint.

grievance procedure; were mandatory subjects of bargaining; and, the discharges were accomplished without notice to the Union or allowing an opportunity for the Union to bargain about the discharges. It is also alleged that on June 6 the Union requested certain information from the Company about the discharge of the two unit employees and that the Company has since that time refused to provide the information to the Union. It is alleged the actions set forth above constitute violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

The Company in its answers to the complaint, and at trial, denies having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. The parties entered into a written 46-paragraph stipulation of facts which was received into the record as a joint exhibit after which the Government and Union rested. The Company called one witness and rested. I have studied the whole record, the post-trial briefs, and the authorities cited. I conclude and find the Company violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION, LABOR ORGANIZATION STATUS, BARGAINING UNIT, AND SUPERVISORY/AGENCY STATUS.

The Company is a corporation with an office and place of business in Astoria, New York, and has since April 1 been engaged in the business of managing an apartment building located at 235 South Lexington Avenue, White Plains, New York. Based on a projection of its gross revenues since about March 31, at which time the Company commenced its operations, the Company will annually derive gross revenues in excess of $500,000 in conducting its operations. In the same timeframe the Company purchased and received at its White Plains, New York facility, products, goods and materials valued in excess of $5,000 directly from points outside the State of New York. The parties stipulate, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The parties stipulate, and I find, the Union has been, and continues to be, a labor organization within the meaning of Section 2 (5) of the Act.

The parties stipulate that the building service employees, including superintendents, handymen, and porters employed by the Company at the South Lexington Avenue property (Property) constitutes a unit (Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Prior to March 31, the Unit employees were employed by Lexington Hills, LLC c/o Bronstein Properties (Lexington Hills) at the Property. During all times that Lexington Hills employed the Unit employees, the Unit employees were responsible for the daily service, maintenance, repair and upkeep of the Property. At all material times since at least October 1, 2010, until on or about March 31, the Union was the exclusive collective-bargaining

representative of Lexington Hills' employees in the bargaining unit described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, and was recognized as such representative by Lexington Hills. Such recognition was embodied in a collective-bargaining agreement effective from October 1, 2010 through September 30.

It is stipulated that Company Shareholders and Officers Anthony and Joseph Pistilli, and, Property Manager Dafne Panayiotou are supervisors and agents of the Company within the meaning of Section 2(11)and 2(13) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Facts

The operative facts, by stipulation of the parties and testimony of the one witness called, are not contested.

In or around March, in connection with South Lexington Associates LLC's (South Lexington Associates) anticipated purchase of the Property, it retained the Company to act and serve as managing agent of the Property.

It is stipulated the Property is located in Westchester County, New York. Chapter 580 of the Laws of Westchester County, known as the Displaced Service Employees Protection Law, imposes certain requirements upon the Company with respect to the former Lexington Hills employees at the Property. Section 580.02(2) of the Displaced Service Employees Protection Law requires, in part, the Company must retain each affected service employee, at a covered location, for 60 days or until its service contract is terminated, whichever is earlier.

By letter dated March 12, the Company notified three (3) of the four (4) Unit employees then employed by Lexington Hills (i.e. Alfredo Munoz; Chafic Hernandez; and Erik Ellington), that, among other things: (a) the Company would be assuming management of the Property on or about March 31; (b) all terms and conditions related to their wages, hours, work rules, and working conditions with Lexington Hills were revoked and nullified in their entirety; (c) the Company was unilaterally setting the initial terms and conditions of their (possible) employment with the Company; (d) the Company was not hiring all employees employed by Lexington Hills at the Property; (e) the Company was offering to hire them on a temporary and trial basis in accordance with their seniority within specific job classifications, provided said employees timely contacted the Company and completed the appropriate documents to apply for employment with the Company; (f) the Company was offering them employment because of, and pursuant to, the Displaced Service Employees Protection Law; and, (g) the Company would determine its hiring and staffing needs *no earlier* than several weeks after the conclusion of the 60-day mandatory retention period required by the Displaced Service Employees Protection Law.

By letter dated March 19, the Union notified South Lexington Associates that the Union represents the Unit, and made an unconditional application for employment of all Unit

employees on their behalf. In its letter, the Union also noted Section 580.02 of the Displaced Service Employees Protection Law required that the incumbent building workers at the Property be hired and retained for at least a 60-day transition period.

By letter dated March 21, The Company notified Enrique Jimenez, the least senior porter then employed by Lexington Hills that: (a) the Company would be assuming management of the Property on or about March 31; and, (b) he would not be offered employment with the Company in accordance with the Displaced Service Employees Protection Law.

On or about March 31, South Lexington Associates purchased the Property at which time Lexington Hills relinquished and the Company assumed management of the Property. At the time the Company assumed management operations of the Property from Lexington Hills there were four employees working for Lexington Hills and were members of the Unit. At the time the Company assumed management operations of the Property from Lexington Hills it hired three of the four employees who previously worked for Lexington Hills and were members of the Unit. The three employees were Chafic Hernandez; Erik Ellington; and Alfredo Munoz. The Company hired these three employees as required by the Displaced Service Employees Protection Law. At the time the Company assumed management operations of the Property from Lexington Hills it did not hire any additional Unit employees and has continued to provide services at the Property in essentially unchanged form. At all material times since March 31, the Company has managed the operations of the Property and has exercised day-to-day supervision and control over all matters and decisions related to the terms and conditions of employment of the Unit employees and specifically the three above named employees. From on/or about March 31, through June 3, as required by the Displaced Service Employees Protection Law, the Company employed a majority of the incumbent Unit employees previously employed by Lexington Hills. From on or about March 31, through June 3, the Company replaced Lexington Hills as the employing entity with a majority of the Unit employees described above and the three unit employees were responsible for the daily maintenance, repair and upkeep of the Property. At all times from on or about March 31, through June 3, the Company provided property management services at the Property.

On or about March 31, the Union verbally requested and on or about April 3, sent a letter to the Company, requesting the Company recognize the Union as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union.

By letter dated April 8, the Company, through its counsel, informed the Union, among other things, that: (a) the Union's demand for recognition was, at that time, premature; (b) the Company's hiring needs would not be determined until after the conclusion of the Displaced Service Employees Protection Law's mandatory retention period; (c) only after the conclusion of the 60-day mandatory retention period under the Displaced Service Employees Protection Law could it be determined whether (or not) the Company is a *Burns Successor;* and (d) the Company was rejecting the Union's request to meet at that time until one of the following events occurred: 1) a Court of final jurisdiction has ruled in *GVS Properties, LLC,* 29–CA–077359; or, 2) the conclusion of the 60-day mandatory employment period required by the

Displaced Service Employees Protection Law has taken place, at which time the Company will determine if it has become a *Burns Successor*.

Since on or about April 8, the Company has failed and refused to recognize and bargain with the Union as the collective-bargaining representative of the Unit employees.

On or about June 3, upon the conclusion of the 60-day mandatory retention period of the Displaced Service Employees Protection Law, the Company terminated the employment of Chafic Hernandez and Erik Ellington. The discharge of Chafic Hernandez and Erik Ellington was within the Company's discretion, and the Company discharged the two without providing the Union notice or an opportunity to bargain.

On or about June 4, the Company hired Altin Kola and Mhill Kola to work as Unit employees, and, including them, the Company at that time employed a total of three (3) Unit employees at the property. On or about June 4, only one of the three Unit employees employed by the Company at the Property was an incumbent employee previously employed by Lexington Hills (i.e., Alfredo Munoz).

By letter dated June 5, to the Company's counsel, the Union requested certain information, namely that the Company provide the work performance standards used and/or considered to evaluate Chafic Hernandez and Erik Ellington, as well as disciplinary policies, records reflecting progressive disciplinary actions, and all relevant employment policies and practices that were in effect during the tenure of Chafic Hernandez and Erik Ellington.

Since on or about June 6, the Company has failed and refused to provide the Union with the information requested in the Union's June 5 letter. Company counsel, Jonathan D. Farrell, orally notified Union Associate General Counsel, Lyle D. Rowen, the Company would not be responding to the Union's information request in light of the Company's contention it has no duty to bargain with the Union.

III. DISCUSSION, ANALYSIS AND CONCLUSIONS

In *NLRB v. Burns International Security Services*, Inc. 406 U.S. 272 (1972), and *Fall River Dyeing & Finishing Corp., v. NLRB* 482 U.S. 27 (1987), the Supreme Court addressed the issue of a successor employer's obligation to bargain with a union that had represented the employees of its predecessor. The Court in its analysis indicated that a determination must first be made as to whether the new company is in fact a successor to the old company. The Court went on to say that in determining a successor issue, which it concluded is primarily factual in nature and based upon the totality of the circumstances of a given situation, focus is given to whether the new company acquired substantial assets of the old company and continues, uninterrupted and without substantial change, the old company's business operations. The determination more specifically focuses on whether there is a "substantial continuity" between the old and new companies. Under this approach, the Court listed a number of factors to be considered namely: whether the business of the old and new employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions as the employees of the old company; whether the employees are under the same

supervisors; whether the new company has the same production process and produces the same products; and, whether the new company has the same body of customers. In applying these factors consideration is given to whether the employees of the old company, that are retained by the new company, will understandably view their job situations as essentially unaltered.

The evidence, as explained below, establishes the Company is a successor employer. First, around March, in anticipation of South Lexington Associates purchase of the Property in question (the apartment building located at 235 South Lexington Avenue, White Plains, New York,), retained the Company here (South Lexington Management Corp.) to act and serve as the managing agent of the Property. Second, on March 12 the Company notified three of the total four unit employees then employed by Lexington Hills at the Property, and, which Lexington Hills employees were responsible for the daily service, maintenance, repair and upkeep of the Property, that it was assuming management of the Property. Third, the Company advised three Lexington Hills employees, namely, Alfredo Munoz, Chafic Hernandez and Erik Ellington it was offering them temporary employment, on a trial basis, subject to certain listed conditions and instructions. Fourth, the Company hired 3 of the 4 Lexington Hills employees effective March 31. The Company notified the fourth employee, Enrique Jimenez, of their decision not to hire him. The Company had concluded the total unit work could be performed with one less employee and Jimenez was chosen based on seniority within his specific job classification. Fifth, the Company assumed, and Lexington Hills ceased, managing the Property on March 31, with 3 of 4 former employees of Lexington Hills. The work tasks performed by employees of the old and new company's are the same, and, the work is located at the exact same property. The work process is identical. The evidence makes clear the 3 employees of the old company understandably viewed their job situations with the new company as essentially unaltered. Accordingly, I conclude and find the Company here is the successor of the old company and a majority (all) of its unit employees were employed by its predecessor. Thus, the Company has an obligation to bargain with its employees bargaining representative, where, as here, it is a successor of the old employer and a majority (here all) of its unit employees were employed by the predecessor. I further note it is undisputed that at all material times from October 1, 2010, until March 31, the Union was the exclusive collective-bargaining representative of the predecessor, Lexington Hills, employees, in an admittedly appropriate unit, and, so recognized by Lexington Hills. The recognition was embodied in a collective-bargaining agreement between Lexington Hills and the Union effective from October 1, 2010, through September 30.

The Supreme Court in *Burns* noted the successor employer there had hired a majority of the predecessors employees and those employees had already expressed their choice of a bargaining representative in an election held "a short time before." The Supreme Court found it reasonable for the Board to assume that the "recently certified" union still represented a majority of the employees the successor employer hired. Here the Union had long been recognized as the collective-bargaining agent for the employees and that recognition had been embodied in a collective-bargaining agreement effective at the time of the change in employers. The Supreme Court in *Fall River Dyeing & Finishing Corp.,* supra, further addressed the "recently certified" portion of its *Burns* decision by specifically concluding; "we now hold that a successor's obligations to bargain is not limited to a situation where the union in question has been recently certified. Where, as here, the union has a rebuttable presumption of majority status, this status continues despite the change in employers. And the new employer has an obligation to bargain

with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor." As noted above, the Company here is a successor employer which hired a majority (all) of its employees from the predecessor work force, and its majority status is not only presumed but established.

I specifically address when the Company had a "substantial and representative complement" of its employees so a determination can be made as to whether a majority of the successor's employees are former employees of the predecessor, inasmuch as that moment triggers the successor's bargaining obligation in a successorship context. The evidence establishes that on March 31, the Company had its full work force of 3 employees and assumed and the predecessor employer relinquished, managing the Property. In reaching my conclusion, I am not unmindful the predecessor utilized 4 unit employees; whereas, the Company here determined the identical work could be performed with only 3 unit employees. The 3 unit employees of the Company on March 31, were **all** former employees of the predecessor and performed the same duties as when they were the predecessor's employees, namely, daily maintenance, repair and upkeep of the Property. On March 31, the Union requested the Company recognize it as the exclusive collective-bargaining representative of the Unit employees and bargain collectively with the Union. As a result of the "substantial and representative complement" being established on March 31, the Company's obligation to bargain with the Union for the Unit employees arose on that date, and I so find.

The Company contends its work complement was not voluntarily and freely decided on March 31, because it was required to hire the predecessors' employees pursuant to Chapter 580 of the Laws of Westchester County, State of New York. Chapter 580 "Displaced Service Employees Protection Law" was enacted in late 2013. The stated purposes for the law were, in part: a recognition that service workers provide necessary and important services that maintain a vibrant economy in the county; that the transition between employers at buildings and property can result in excessive or arbitrary displacement of service workers often characterized by the replacement of experienced workers with inexperienced ones at entry level wages that may result in a disruption of service delivery and increased costs to employers, employees, clients and the local economy. Historically, a Committee for the Board of Legislators for Westchester County reported to the legislators, "your Committee finds that a local law to prevent the displacement of service workers can aid the economy in Westchester County by reducing excessive employee turnover and can promote the well-being of a substantial workforce population within the County." The Displaced Service Employees Protection Law covers multifamily residential buildings or complexes with more than 100 units, as is the case here. The Displaced Service Employees Protection Law, in part, requires that: "each successor employer must retain each affected service employee at a covered location for sixty (60) days or until its service contract is terminated whichever is earlier;" and "each successor employer may retain less than all of the affected services employees during the sixty (60) day transition if the successor employer (i) finds that fewer service employees are required to perform the work than the predecessor employer employed;" and, "a successor employer may not discharge a service employee retained under the Displaced Service Employees Protection Law without just cause during the 60-day transition period.

The Company's nonvoluntary hiring of a substantial and representative complement of employees by March 31, defense is without merit. The Company made a voluntary and conscious decision to assume the job duties and responsibilities of the predecessor company. The Company knew, easily could, or should, have known, the predecessor's employees were represented by the Union and that a collective-bargaining agreement was in effect between the predecessor employer and the Union covering the Unit employees. The Company knew of the County's Displaced Service Employees Protection Law, and, even with such knowledge, voluntarily and freely proceeded to assume the job responsibilities of the predecessor employer and hired 3 of the predecessor's trained employees and utilized them as its **total** work force. The Company may not now escape the bargaining obligation of its decisions by pleading it had to hire the predecessor's employees. On this specific point the county Law, as well as the Act, are in harmony, in that both seek to promote stability for employees and labor peace and harmony where there is nothing more than a mere change in the employees' employer. A harmonious county law does not permit an employer, such as the Company here, to escape its successorship bargaining obligations under Board law and the Act, which bargaining obligations I find attached on March 31. Phrased another way, the mere fact a county Law requires the retention of the predecessor's employees for a fixed period does not alter the application of the Board's successorship doctrine. Nor does the fact the Company notified the employees of the predecessor employer that they were hired to work for the new company as temporary employees on a trial basis subject to newly established working rules and procedures. The temporary employment or trial status basis of their employment did not in any way remove them from the status of employees with respect to a determination of the Union's majority status for successorship purposes. *Windsor Convalescent Center of North Long* 351 NLRB 975, 978 (2007) enf. denied in part on other grounds, 570 F.3d 354 (D.C. Cir. 2009). Simply stated, where the predecessor's employees constitute a majority of the successor's work force (here the entire work force), in an appropriate unit, why the successor chose or was required to hire the predecessor's employees is not relevant.

In summary, I find the Company violated Section 8(a)(5) and (1) of the Act when on and after April 8, it failed to recognize and bargain with the Union as the collective-bargaining representative of the Unit employees.

On June 5, the Union, in a letter to Company counsel, requested the Company provide the Union, "the work performance standards used and/or considered to evaluate Chafic Hernandez and Erik Ellington, disciplinary policies, records reflecting progressive disciplinary actions, and all relevant employment policies and practices that were in effect during the tenure of Chafic Hernandez and Eric Ellington."

On June 6, Company Counsel responded to the Union in writing that the Company, "would not be responding to the Union's information request in light of [the Company's] contention that it has no duty to bargain with the Union."

It is alleged that the Company's failure and refusal to provide the Union with the information it requested violates Section 8(a)(5) and (1) of the Act.

Section 8(a)(5) and 8(d) of the Act obligates an employer to furnish information requested by its employees' bargaining representative that is relevant and necessary for the proper performance of its representative duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The obligation to supply information is determined on a case-by-case basis, and it depends on a determination of whether the requested information is relevant and, if so, sufficiently important or needed to invoke a statutory obligation on the part of the other party to produce it. *White-Westinghouse Corp.,* 259 NLRB 220 fn.1 (1981). The Board applies a liberal, discovery-type standard to determine relevance. *Quality Building Contractors, Inc.,* 342 NLRB 429 (2004). The Board noted in *Coca-Cola Bottling Co.,* 311 NLRB 424, 425 (1993), that in making this determination it has repeatedly followed the principles enunciated by the Third Circuit in *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3rd Cir. 1965) that information which is at the core of the employer-employee relationship is presumptively relevant and needs to be provided. Simply stated, the Board treats information that goes to the core of the employer-employee relationship, pertaining to bargaining unit employees, as presumptively relevant, such as information pertaining to the termination of unit employees. As to this type of information, a union is not required to show the precise relevance of the information, unless the employer provides some effective rebuttal. The Company here provided no such rebuttal.

Here, the information is presumptively relevant and the Company was, and is, obligated to furnish the information. The Company's failure to furnish the requested information violates Section 8(a)(5) and (1) of the Act and I so find. The Company does not challenge the requirement to furnish the requested information on any basis other than it has no bargaining obligation with the Union. Having found the Company does have a bargaining obligation its only defense is without merit.

It is stipulated that on June 3, after the conclusion of the mandatory retention period under the Displaced Service Employees Protection Law the Company discharged unit employees Chafic Hernandez and Erik Ellington. It is also stipulated: the discharges were within the Company's discretion; where at a time when the Company and Union had not arrived at a first contract or an interim grievance procedure; were mandatory subjects of bargaining; and, were accomplished without notice to the Union or for allowing an opportunity to bargain about the discharges. It is alleged the Company's actions, as just described above, establish it has failed and refused to bargaining collectively and in good faith with the Union as the exclusive collective-bargaining representative of the Unit within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

The Government and Union contended at trial and in their post-trial briefs that the Board's rationale in *Alan Ritchey, Inc.* 359 NLRB No. 40 (2012) is sound and should be adopted here, namely, that an employer whose employees are represented by a union, but at a time when the parties have not arrived at a first contract or an interim grievance procedure must bargain with the union before imposing discretionary discipline on a unit employee. The Board explained this preimposition duty to bargain will usually only arise during the period after the Union has become the employees' bargaining representative, but before the parties have agreed upon a first contract, or interim grievance procedure.

The Company contends the Board's decision in *Alan Ritchey* is a nullity pursuant to the Supreme Court's holdings in *New Process Steel, L.P. v NLRB* 560 U.S. 674 (2010) and *Noel Canning* 134 S.Ct. 2550 (2014). The Company further contends this case is controlled by the Board's decision in *Fresno Bee,* 337 NLRB 1161 (2002) that an employer has no preimposition duty to bargain over discretionary discipline.

In addressing the continued validity, or lack thereof, of the Board's *Alan Ritchey* decision it is necessary to briefly review the two Supreme Court decisions referenced above. The Supreme Court in *New Process Steel* held that although the Board, pursuant to the Act's delegation clause, could delegate its powers to a three-member group, two members of that delegated group could not continue to exercise that delegated authority once the group's, and the Board's membership, fell to two. In *Noel Canning* the Supreme Court held that the President's recess appointments for Sharon Block, Richard Griffin and Terence Flynn, made in 3-day periods, between two pro forma sessions of the Senate, were not valid under the Recess Appointments Clause, and that during their appointments, the Board lacked a quorum. The Court concluded a 3-day period was too short to constitute a recess for purposes of the Recess Appointments Clause and pro forma sessions could not be construed as actually being recesses lengthening the recess period.

Simply stated, *Noel Canning* held that the President's recess appointments, made in a 3-day period between two pro forma sessions of the Senate were not valid appointments because at the time of the appointments the Senate was not in a recess of sufficient length. Members Block and Griffin were two of the three Board members deciding *Alan Ritchey*. Board Chairman Pearce was the only validly sitting Board member on the *Alan Ritchey* panel. As an invalid (based on constitutional considerations) Board decision, it has no precedent and **none** is afforded it here. In fact, the *Alan Ritchey* case has since the Supreme Court's two decisions, been closed.

Although *Alan Ritchey* has no precedential value, I, nonetheless, adopt the Board's *Alan Ritchey* rationale, as I find it independently persuasive.

In *Alan Ritchey* the Board addressed, in its broader doctrinal context, under Section 8(a)(5) of the Act, whether an employer whose employees are represented by a union must bargain with the union prior to imposing discretionary discipline on a unit employee. The Board noted that this particular question usually arises only during the period after the union has become the employees' bargaining representative, but before the parties have arrived at an initial collective-bargaining agreement, and only if the parties have not agreed upon an interim grievance procedure. The Board held, under this limited application, that, like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and employers may not impose discretionary discipline unilaterally. It is the Board's rationale that I adopt here and explain as follows.

The Board in *Alan Ritchey* noted it had held in a variety of other contexts that once employees choose to be represented, an employer may not continue to act unilaterally with respect to terms and conditions of employment, even where it has previously done so routinely or at regularly scheduled internals. The Board further notes, the Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962) approved its determination that an employer violates Section 8(a)(5) of the

Act by making unilateral changes to represented employees' terms and condition of employment. Such a unilateral change is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) just as a flat refusal to bargain does. The Board, citing *Oneita Knitting Mills,* 205 NLRB 500 (1973), pointed out that if an employer has exercised and continues to exercise discretion in regard to a unilateral change such as the amount of an annual wage increase, it must first bargain with the union over the discretionary aspect. The Board's *Alan Ritchey* rationale, relying on *Toledo Blade Co* 343 NLRB 385, 387 (2004), does not require notice and bargaining before every unilateral change but rather those changes that have a material, substantial, and significant impact on employees' terms and conditions of employment such as termination. The Board opined that requiring notice and bargaining before imposing discretionary discipline is appropriate because of the immediate impact on the employees and because of the harm caused to the union's effectiveness as the employees' representative if bargaining is postponed. The Board in *Alan Ritchey* went on to explain it has long recognized that an employer's obligation to maintain the status quo sometimes entails an obligation to make changes in terms and conditions of employment, even when those changes are an established part of the status quo. The Board in *Oneita Knitting Mills* 205 NLRB 500 (1973) held an employer violated Section 8(a)(5) by unilaterally granting merit wage increases to represented employees, even though it had a past practice of granting such increases. The Board in *Oneita Knitting Mills* explained:

> An employer with a past history of a merit increase program neither may discontinue that program (as we found in *Southeastern Michigan* [supra]) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. *N.L.R.B. v. Katz*, 3[69] U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted Id. at 500.

The Board in explaining its rationale in *Alan Ritchey* noted *NLRB v. Katz* 369 U.S. at 746 involved an employer's grant of merit increases that were "in no sense automatic, but were informed by a large measure of discretion." The Board also noted in its *Alan Ritchey* rationale that in the decades since *NLRB v. Katz* and *Oneita Knitting Mills,* where considering various terms and conditions of employment, it had applied the principle that even regular and recurring changes by an employer constitute unilateral actions where an employer maintains discretion in relation to the nature and/or extend of the charges.

The Board in its *Alan Ritchey* rationale noted that in *Washoe Medical Center, Inc.* 337 NLRB 202 (2001) an employer's "substantial degree of discretion" in placing newly hired employees into one of four wage ranges based on subjective judgments, required the employer to bargain with the union prior to implementing the wage rates. Further noting it held in *Eugene Iovine* 328 NLRB 294 (1999) an employer's recurring unilateral reductions in employees' hours of work were discretionary and therefore required prior bargaining because there was no reasonable certainty as to the timing and/or criteria for the reduction in employee hours but rather the employer's discretion to decide whether and when to reduce employee hours appeared

unlimited. The Board noted that in *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. (1990)) it required an employer to bargain regarding economically motivated layoffs, when the owner selected the employees to be laid off based, not on seniority, but on his own judgment of the employees abilities.

Under this large umbrella of cases (and others) the Board articulated its rationale for concluding that an employer whose employees are represented by a union, and at a time when the parties have not arrived at a first contract or an interim grievance procedure, must bargain with the union **before** imposing discretionary discipline, (a mandatory subject of bargaining) on unit employees.

I find the case here falls squarely under the Board's articulated *Alan Ritchey* rationale. In that regard it is stipulated the Company terminated Unit employees Chafic Hernandez and Erik Ellington on June 3; the discharges were within the Company's discretion; were mandatory subjects of bargaining; and, the discharges were accomplished without providing the Union notice or an opportunity to bargain. It is established the Company is a successor employer with an obligation to bargain with the Union for the Unit employees--which bargaining the Union specifically requested. It is established there was no collective-bargaining agreement in effect and no grievance procedure established at the time of the discharges. I adopt the Board's *Alan Ritchey* rationale and conclude the Company had an obligation to provide notice to and an opportunity to bargain with the Union prior to imposing the discretionary discipline (discharge) of the two unit employees and as such the Company violated Section 8(a)(5) and (1) of the Act, and I so find.

I address the Company's contention that since the Board's *Alan Ritchey* decision is a nullity that *Fresno Bee*, 337 NLRB 1161 (2002) constitutes current Board law on the preimposition duty to bargain over discretionary discipline. In *Fresno Bee* the Board adopted an administrative law judge's finding an employer has no preimposition duty to bargain over discretionary discipline. The Board in discussing its rationale in *Alan Ritchey*, for rejecting *Fresno Bee,* which rationale I adopt here, pointed out that government counsel in *Fresno Bee*, drawing on the principles and precedent the Board considered in *Alan Ritchey*, argued the employer in *Fresno Bee* exercised considerable discretion in disciplining its employees and thus had to bargain to impasse with the union over **all** imposition of discipline. The Board, in *Alan Ritchey,* noted the judge in *Fresno Bee* rejected that argument, but, her rationale for doing so, misunderstood Board case law and failed to explain why discipline should be treated as fundamentally different from other employer unilateral changes in terms and conditions of employment. In *Alan Ritchey* the Board noted regarding the judge's rationale in *Fresno Bee*:

> As her decision reveals, the judge's error was to conclude that because the employer had not changed its disciplinary system, the imposition of discipline with respect to individual employees, even if it involved the exercise of discretion, did not amount to a unilateral change.

The Board's rationale in *Alan Ritchey* for arriving at its conclusion the trial judge in *Fresno Bee* was wrong, noted the trial judge accepted the fact that the discipline administered to employees in *Fresno Bee* was, in part, discretionary and noted the judge in *Fresno Bee:*

> Nevertheless, . . . reasoned that the fact the procedures reserve to [the employer] a degree of discretion or that every conceivable disciplinary event is not specified, does not vitiate the system as a past practice and policy." Id. The General Counsel had not contended that the employer's "discipline policies were unilaterally altered," and "[t]here was no evidence that [the employer] did not apply its preexisting employment rules or disciplinary system in determining discipline." Id. *"Therefore,"* the judge concluded, the employer "made no unilateral change in terms and conditions of employment when it applied discipline." Id. at 1186-1187(emphasis added).
>
> Under our case law, the judge's conclusion was a non sequitur. As we have explained, the lesson of well-established Board precedent is that the employer has both a duty to maintain an existing policy governing terms and conditions of employment and a duty to bargain over discretionary applications of that policy. It was no answer to the General Counsel's argument in *Fresno Bee*, then to say that because the employer's disciplinary policy had stayed the same, the employer had no duty to bargain over discretionary disciplinary decisions. Nor did it suffice to point out that the employer had bargained over the discipline *after* it was imposed: the General Counsel was arguing for a *preimposition* duty to bargain. Id. at 1187

The Board placed an exclamation point on its rationale in *Alan Ritchey* on the demonstrably incorrect conclusion the trial judge in *Fresno Bee* had arrived at by:

> As observed, the *Fresno Bee* Board simply adopted the judge's rationale. But that rationale–the only rationale articulated–was demonstrably incorrect. In such circumstances, we decline to follow *Fresno Bee.* See *Goya Foods of Florida*, 356 NLRB No. 184, slip op. at 3 (2011) ("We are not prepared mechanically to follow a precedent that itself ignored prior decisions, without explanation.") . To the extent *Fresno Bee* contradicts our conclusion here, it is overruled. [footnote omitted]

Here, I reject the Company's contention *Fresno Bee* is controlling and rather adopt the Board's *Alan Ritchey* rationale that an employer has a preimposition obligation to bargain over discretionary discipline at a time when the parties have not arrived at a first contract or an interim grievance procedure and the concerns involve mandatory subjects of bargaining.

CONCLUSIONS OF LAW

1. The Company, South Lexington Management Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 32BJ, Service Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, Local 32BJ has been, and continues to be, the exclusive bargaining representative of the building service employees, including superintendents, handymen, and porters employed by South Lexington Management Corp., at its 235 South Lexington Avenue, White Plains, New York location, for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. By, on April 8, refusing to recognize and bargain with the Union following the Union's April 3 demand, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By, on June 3, failing to provide the Union with notice or an opportunity to bargain concerning the discharge of Unit employees Chafic Hernandez and Erik Ellington, which discharges were within the discretion of the Company, and at a time when the parties had not arrived at a first contract or an interim grievance procedure, and, which discharges were mandatory subjects of bargaining, the Company violated Section 8(a)(5) and (1) of the Act.

6. By, on and after June 6, refusing to furnish to the Union information it requested in writing on June 5, specifically the work performance standards used and/or considered to evaluate Chafic Hernandez and Erik Ellington, disciplinary policies, records reflecting progressive disciplinary actions, and all relevant employment policies and practices that were in effect during the tenure of Chafic Hernandez and Erik Ellington, the Company violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Company unlawfully refused to recognize and bargain with the Union, I recommend the Company be ordered to, forthwith, recognize and bargain with Local 32BJ, Service Employees International Union, as the exclusive collective-bargaining representative of the employees in the appropriate Unit described elsewhere here, concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement. I specifically recommend the Company be ordered to bargain with the Union regarding the discharge of Unit employees Chafic Hernandez and Erik Ellington. I decline to recommend any additional remedies (such as reinstatement and/or backpay) as the Board, in its null and void *Alan Ritchey* decision, applied its holdings prospectively. Additionally, I also recommend the Company be ordered to furnish the Union, in a timely fashion, the requested work performance standards used and/or considered to evaluate Chafic Hernandez and Erik Ellington, including disciplinary policies, records reflecting progressive disciplinary actions, and all relevant employment policies and practices that were in effect during the tenure of Chafic Hernandez and Erik Ellington. Additionally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

ORDER

The Company, South Lexington Management Corp., its officers, agents, successors, and assigns, shall

1. Cease and Desist from

(a) Failing and refusing to recognize and bargain with the Union on and after April 8, as the exclusive collective-bargaining representative of its Unit employees.

(b) Failing to bargain with the Union concerning the discharge of Unit employees Chafic Hernandez and Erik Ellington.

(c) Failing to furnish to the Union information it requested concerning the work performance standards used and/or considered to evaluate Chafic Hernandez and Erik Ellington, including disciplinary policies, records reflecting progressive disciplinary actions, and all relevant employment policies and practices that were in effect during the tenure of Chafic Hernandez and Erik Ellington.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Recognize and bargain collectively with Local 32BJ, Service Employees International Union as the exclusive representative of its Unit employees.

(b) Bargain with the Union concerning the discharge of Unit employees Chafic Hernandez and Erik Ellington.

(c) Furnish the Union the information it requested concerning the work performance standards used and/or considered to evaluate Chafic Hernandez and Erik Ellington, including disciplinary policies, records reflecting progressive disciplinary actions, and all relevant employment policies and practices that were in effect during the tenure of Chafic Hernandez and Erik Ellington.

(d) Within Fourteen (14) days after service by the Region, post at its facility at 235 South Lexington Avenue, White Plains, New York, copies of the notice marked "Appendix"[6] copies of the notice, on forms provided by the Regional Director for Region 02, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places

[6] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as email, posting on the intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facilities involved here, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since March 31, 2014.

(e) Notify the Regional Director of Region 02 in writing within 20 days from the date of this Order what steps the Company has taken to comply.

Dated: Washington, D.C. January 29, 2015

William N. Cates
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

WE WILL NOT refuse to recognize and bargain in good faith with Local 32BJ, Service Employees International Union, as the exclusive collective-bargaining representative of an appropriate unit of our employees, namely, all building service employees, including superintendents, handymen, and porters employed by us at our 235 South Lexington Avenue, White Plains, New York location.

WE WILL NOT refuse to bargain in good faith with 32BJ, Service Employees International Union, by refusing to provide 32BJ, Service Employees International Union, an opportunity to bargain concerning the discharge of Unit employees Chafic Hernandez and Erik Ellington.

WE WILL NOT refuse to bargain in good faith with 32BJ, Service Employees International Union, by refusing to furnish 32BJ, Service Employees International Union, the information it requested concerning the work performance standards used and/or considered to evaluate Chafic Hernandez and Erik Ellington, including the disciplinary policies, as well as records reflecting progressive disciplinary actions, and all relevant employment policies and practices that were in effect during the tenure of Chafic Hernandez and Erik Ellington.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL bargain collectively in good faith with Local 32BJ, Service Employees International Union, as the exclusive representative of the Unit employees in the appropriate bargaining unit noted above, and, put in writing and sign, any agreement reached on terms and conditions of employment.

WE WILL bargain in good faith with Local 32BJ, Service Employees International Union concerning the discharge of Unit employees Chafic Hernandez and Erik Ellington.

WE WILL furnish to 32BJ, Service Employees International Union, the information it requested concerning the work performance standards used and/or considered to evaluate Chafic Hernandez and Erik Ellington, and the disciplinary policies, as well as records reflecting progressive disciplinary actions, and all relevant employment policies and practices that were in effect during the tenure of Chafic Hernandez and Erik Ellington

SOUTH LEXINGTON MANAGEMENT CORP.
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: ww.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104
(212)264-0300 Hours: 8:45 a.m. to 5:15 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-126454 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212)264-0346